Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-1112

GLORIA A. BROTHERS and
EDGAR C. NEWALL,
Petitioners,

v.

ARTHUR SCHIMKE, TOM OLIVER,
JAMES BELA, KEN GILBERTSON,
CHIP CARTWRIGHT, DOES IV
THROUGH VI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William Braly Murray
Attorney for Petitioners
1610 Standard Plaza
Portland, Oregon 97204
Telephone: (503) 226-3819

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdictional Statement	1
Question Presented	2
Constitutional Provision, Statutes and Regulations in pertinent part	3
Statement of the Case	6
Reasons for Granting the Writ	11
Similarity to Walker v. Hoffman No. 78-724, pending on petition for Writ of Certiorari	13
Conclusion	18

AUTHORITIES CITED

CASES

Butz v. Economu, 98 S Ct. 2894 (June 29, 1978)	12, 13, 16
National Aviation Underwriters v. Altus Flying Service, Inc. 555 F2d 778 (1977)	17
Rholfing v. Cat's Paw Rubber Co., 17 FRD 426 (N.D. Ill. E.D. 1954)	17, 18
Scheuer v. Rhodes, 416 U.S. 232 (1974)	13

Table of Authorities (continued)

	Page
Subin v. Goldsmith, 224 F2d 753 (CA 2 1955)	16, 17
Walker v. Hoffman, No. 78-724 pending on petition for writ of certiorari in United States Supreme Court	13, 14
Wilbur v. United States ex rel. Krushnic, 320 U.S. 306 (1932)	13
Wood v. Strickland, 420 U.S. 308 (1975)	13
The Yankee Lode Claim, 30 L.D. 289 (1900)	15
Treatises	
Wright, Law of Federal Courts 493 (1976)	16
CONSTITUTION, STATUTES ETC.	
Fifth Amendment to Constitution of the United States	12
16 USC §482	4
28 USC §1331	6
28 USC §1343 (1), (2)	6
30 USC §22	4
30 USC §35	4
30 USC §612	4, 5, 12
36 CFR §252.1	5

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OPINIONS BELOW

The unreported opinions delivered in the courts below are appended hereto in the Appendix A-1 to A-9.

JURISDICTIONAL STATEMENT

The decision sought to be reviewed was made and entered October 17, 1978. This petition for certioriari is filed within 90 days thereafter.

Jurisdiction to review by writ of certiorari is conferred on this Court by 28 USC §1254 (1).

QUESTION PRESENTED

Whether this Court should reverse summary judgment granted below to defendants, based on defendants' assertion that good faith belief in the appropriateness of their action entitled them to immunity from this civil rights damage action for alleged violation of petitioners' Fifth Amendment rights to "Due Process" and protection of real property against taking without compensation, pursuant to conspiracy to do so, where low-level United States Forest Service employees acted outside the scope of their authority and seized petitioners' mining claim, located on ground open to mineral entry, by posting over petitioners' location notice on a cabin, permanently fixed to the ground by a former claimant who had abandoned the claim, a proclamation stating: "Property of the United States. All persons are prohibited under penalty of the law from committing any trespass."

This question calls for correction of four false assumptions as to legal principles underlying many disputes arising out of similar circumstances, which were the basis for the erroneous decisions below:

(1) The false assumption that after an earlier locator of a mining claim has abandoned it, a subsequent locator does not acquire possessory title to improvements, including a cabin or other structures permanently fixed to the ground by the earlier locator, as well as to the

ground embraced within the limits of the claim.

(2) The false assumption that invalidation of an earlier location of a mining claim by administrative decision that insufficient mineral discovery had been made, precludes the making of a valid subsequent location of the same ground.

(3) The false assumption that Forest Service employees can take upon themselves authority to disregard a subsequent locator's location of a mining claim on land open to mineral entry and seize the claim as "Property of the United States" by posting a notice prohibiting any person from trespassing thereon.

(4) The false assumption that a civil rights action charging low level federal administrative agents with violation of Fifth Amendment rights to "Due Process" and protection against the taking of property in the name of the United States without compensation, pursuant to a conspiracy to do so, should be dismissed without allowing plaintiffs opportunity to prove their allegations, when defendants aver "good faith belief in the appropriateness of their actions."

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATIONS IN PERTINENT PART

U.S. Constitution: "Due Process" and protection of property rights under the Fifth Amendment are so well known to the Court that the amendment need not be set forth.

Statutes: 16 USC §482(codified 1970), known as the Organic Administration Act of 1897, creating the national forest system, provides that nothing therein shall interfere with the operation of the mining law.

"Any mineral lands in any national forest...subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions contained in Sections 473-482 and 551 of this Act." 16 USC §482.

The mining law provides:
30 USC §22 "...all valuable mineral deposits in lands belonging to the United States...shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States..."

30 USC §35 "Claims usually called 'placers', including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims...."

30 USC §612 "Unpatented mining claims-Prospecting, mining or processing operations...Reservations in the United States to use of the surface and surface resources.

(b)...any use of the surface of any such claim by the United States...shall be such as not to endanger or materially

interfere with prospecting, mining or processing operations or uses reasonably incident thereto...

(c) Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith... no claimant of any mining claim... shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States..."

The Administrative Procedure Act provides in 5 USC §558(b): "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

Regulations:

The Forest Service regulations disclaim any intention to intefere with use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws. "It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior." 36 CFR §252.1.

STATEMENT OF THE CASE

The District Court for Oregon had jurisdiction of this case arising under the federal Constitution and the mining laws of the United States by virtue of 28 USC §1331. The matter in controversy exceeds the value of $10,000. The District Court had jurisdiction of the counts of the complaint arising under the Civil Rights Acts by virtue of 28 USC §1343 (1) and (2).

Petitioners, plaintiffs below, located a gold placer mining claim in Grant County, Oregon, on July 29, 1975. This occurred more than a year after a Mrs. Gladys Wagner had abandoned the claim and failed to appeal an administrative determination invalidating her claim covering the same ground. R 28. Forest Service employees had been urging Mrs. Wagner to dismantle the two old cabins on the ground and to remove her personal possessions therein, which she declined to do. R 14, 28. Plaintiff Brothers accompanied Mrs. Wagner to a meeting where this was discussed with Forest Service personnel. R 14.

Defendant Chip Cartwright,of the Baker Forest Service office, assured plaintiff Brothers that the ground was open for her or any other citizen to locate, and plaintiff Brothers and her brother, Edgar Newall, did so the next day. R 42-A

Plaintiffs' affidavits establish that there was no contractual relation between themselves and the former claimant, and their location was based on their own

prospecting of the ground. R 42-B to R 42-I.

A few days after plaintiffs made their location of this open ground, defendant Schimke, the District Ranger, seized in the name of the United States plaintiffs' mining claim, which had not been the subject of any administrative or court proceeding to determine its validity.

Plaintiffs' complaint alleges: "Said defendants, for the purpose of harassing the plaintiffs, in violation of their civil rights, entered upon plaintiffs' mining claim and posted a sign on plaintiffs' cabin on said claim reciting that this is property of the United states. Said sign was posted over plaintiffs' location notice on said mining claim. Defendants told plaintiff Brothers that she had no right to be on said land and that defendants were going to burn down or destroy her cabins and that they would confiscate plaintiffs' personal property and equipment on said claim." R 3. "That proximately caused by said deprivation of their civil rights, plaintiffs have been denied the right to make lawful use of their property under threat of penalties." R 3.

On April 30, 1976, petitioners filed a Complaint for damages for deprivation of civil rights, for conspiracy to deprive plaintiffs of civil rights, and for failure to protect plaintiffs against conspiracy to deprive them of civil rights, and demanded a jury trial. This action was brought against Arthur Schimke and Tom Oliver and Does I through

X in their individual capacities and not as agents of the United States Forest Service, seeking $100,000 general damages and $200,000 punitive damages for actions outside the scope of any lawful duty. R 1-4.

Defendants Schimke and Oliver did not answer the complaint. On August 6, 1976, they filed a Rule 56 motion for summary judgment R 6, supported by a memorandum of law, R 7-10, and affidavits and answers to interrogatories, R 11-32, urging that defendant Oliver had nothing to do with posting any signs on the claim and that defendant Schimke had acted in good faith belief that his actions were done on reasonable grounds in the performance of what he believed to be his official duties. Defendants' disculpatory statements did not deny knowledge of plaintiffs' having located their claim but stated defendants' contention that invalidation of the earlier claim on the ground had caused the structures to become property of the United States. R 28. Defendant Schimke denied that he intended to burn plaintiffs' buildings or to confiscate and sell their personal property. R 15.

On September 29, 1976, petitioners filed in answer to defendants' motion for summary judgment a memorandum of authorities, R 43 to R 48, and the affidavit of Gloria Brothers, R 40 to 42-I, incorporating affidavits made September 11 and 12, 1976, by Gloria Brothers and Edgar Newall in a case for inverse condemnation arising out of the same incident.

Mrs. Brothers' affidavits controvert defendants' protestations of good faith belief that they were acting in performance of official duty by averring that defendants knowingly acted contrary to law and in excess of their authority, with knowledge that they abused their official power and had no reasonable ground for confiscating petitioner's property, and did not act in good faith but maliciously and vindictively in retaliation for Mrs. Brothers' having complained to the police about an earlier incident when employees of the Forest Service had confiscated her mining claim in Baker County and had burned her cabin thereon without notice or hearing and without authority. R 40 to 41, R 42-C.

These affidavits also show that the defendants had been alerted to Mrs. Brothers' intention to locate the ground abandoned by Mrs. Wagner because, before locating the Vivian Revived Placer Claim, she had inquired and had been informed by Chip Cartwright that the ground could be located by her or any other person; it had not been withdrawn from mineral entry. R 42-A. Mr. Newall's affidavit corroborates this. R 42-H.

On September 29, 1976, petitioners also served and filed an amended complaint as a matter of course, pursuant to Rule 15 a F.R.C.P. R 34 to 38. They named as additional defendants three of the "John Does": James Bela, Ken Gilbertson and Chip Cartwright, and restated the position taken in their original complaint in three counts: first, for violation of their constitutional rights; second, a count under

42 USC §1985(3) charging performance of overt acts in furtherance of a conspiracy to deprive petitioners of their constitutionally protected property, and third, a count under 42 USC §1986 for failure to protect petitioners from such conspiracy.

None of the defendants made any response to the Amended Complaint. Before the time to answer had elapsed, on November 8, 1976, United States District Judge Robert Belloni approved the Recommendation and Order entered by Magistrate George Juba and granted summary judgment to defendants and dismissed the action. R 89-92. A-6 to A-9.

The decision below upholds defendants' assertion of immunity as federal employees on the basis of their averments that they acted in good faith belief in the reasonableness of their conduct. R 90. The District Court's decision is predicated upon the assumption that "there is no showing that these defendants were even aware of plaintiffs' attempted relocation at the time that the cabins were posted." R 91. But when the sign prohibiting any person under penalty from trespassing on property of the United States was posted by defendants, they must have been aware of petitioner's location of their claim, for defendants made no attempt to deny having posted the sign "over plaintiffs' location notice on said mining claim", as alleged in the complaint. R 3. Defendants never denied having been aware of petitioners' location of their mining claim.

The memorandum opinion of the Court of Appeals for the Ninth Circuit assumes that the sign posted by defendants deprived plaintiffs of their right to prospect the claim that plaintiffs had located. a-2. The opinion holds that assuming further that plaintiffs had a possessory interest in the cabins [seized without any authority and without observing any shred of "Due Process of Law"], it was still correct for the district court to grant summarily defendants' assertion that their "good faith belief in the reasonableness of their action" immunized defendants from this civil rights lawsuit. A-3 to A-5.

The decision below ignores the fact that federal administrative agents have no immunity from lawsuits claiming damages for action outside the scope of such agents' official authority which deprives plaintiffs of constitutionally protected rights.

REASONS FOR GRANTING THE WRIT

This honorable Court should review and correct the Ninth Circuit's having twice within a period of five months, from June to November 1978, issued rulings which grant immunity from suit to federal administrative agents whose actions went beyond the limits of their authority and violated citizens' property rights and right to "Due Process of Law" guaranteed by the Fifth Amendment to the Constitution of the United States. These decisions contradict the rulings of this Court and should therefore be reversed.

This Court has ruled many times that the doctrine of qualified immunity from suit does not apply to an agent or officer of the United States who goes beyond his actual authority when seizing property in the name of the United States. In the recent case of Butz v. Economou, 98 S. Ct. 2894 (June 29 1978) this Court reaffirmed the longstanding rule that a federal official may not with impunity ignore the limitations which the controlling law has placed upon his powers.

Here, defendants' assertion that they had acted in performance of their official duties raised at best a genuine issue of material fact which made summary judgment for defendants inappropriate. Plaintiffs' opportunity to prove their case should not have been cut off before trial.

Defendants' authority to act with respect to mining claims is limited by the mining law. 30 USC §612 prohibits agents of the United States from taking any action which would materially interfere with a mining locator's prospecting, mining or processing activities or uses reasonably incident thereto. And the "Due Process of Law" provision of the Fifth Amendment has the effect of requiring agents of the United States to respect a locator's possessory title to all portions of a mining claim until after an administrative contest or a court proceeding has terminated the locator's rights acquired by acts of location.

This Court has recognized that a located mining claim is "property in the highest sense of the term." Wilbur v. United States ex rel. Krushnic, 320 U.S. 306 (1932). It is constitutionally protected against seizure as "Property of the United States".

The decision below, granting immunity for action outside the scope of official authority which deprives a citizen of constitutional rights, is contrary to this Court's rulings in Wood v. Strickland, 420 U.S. 308 and in Scheuer v. Rhodes, 416 U.S. 232 (1974) and in Butz v. Economu, 98 S.Ct. 2894 (1978). All these cases deny the qualified immunity defense where the defendants' action went beyond their authority.

SIMILARITY TO WALKER v. HOFFMAN No. 78-724 PENDING ON PETITION FOR WRIT OF CERTIORARI.

The Ninth Circuit's opinion states A-4 that the present case presents "essentially the same fact situation" and is disposed of by its decision in Walker v. Hoffman. That case is the subject of petition for writ of certiorari No. 78-724 now pending before this honorable Court.

Petitioners respectfully submit that it would be appropriate for this Court to review both cases together, for both cases contradict the same legal principles established by this Court's decisions.

In both cases, defendants are low level employees of the United States Forest Service who disregarded plaintiffs' having located mining claims on lands open to mineral entry.

The essential feature of both cases is defendants' disregard of the citizens' rights to "Due Process of Law" when they seized in the name of the United States plaintiffs' mining claims and the structures thereon, without first conducting any administrative or court proceeding to extinguish the locators' constitutionally protected property rights.

Unless this Court will review and correct Walker v Hoffman and Brothers and Newall v. Schimke et al., the effect of these cases will be to assure federal administrative agents that they will be immune from lawsuits seeking damages for unauthorized seizure of citizens' property rights, if the agents aver that they had acted in good faith belief that they were performing official duties. The property owners' right to "Due Process" will lose any meaning.

It is important to a great many citizens for this Court to grant certiorari and to correct false assumptions as to legal principles which vitiate the decisions below in both cases. At the present time, the Forest Service is carrying on a campaign to evict many miners from structures needed for shelter and for storage of mining equipment under the pretext that location of the mining claims did not entitle the miners to possession of structures abandoned on the claims by earlier locators. Unless the Court will review and correct Walker v. Hoffman and the present case, the Forest Service will urge the erroneous decisions below as precedents to justify their unjust and oppressive practice.

(1) This Court should make it clear that buildings abandoned by a former claimant, like other improvements firmly affixed to the ground, are part of the real property, and a new location of the mining claim vests in the locators possessory title to such buildings and improvements as well as to the ground embraced within the boundaries of the claim. The Interior Department has so recognized for long years. The Yankee Lode Claim, 30 L.D. 289 (1900).

In Brothers & Newall, the Forest Service, through defendant Chip Cartwright, officially notified Mrs. Brothers before petitioners located their claim that the ground was open for her or any other citizen to locate. R 42-A. This was official recognition that the former claimant had abandoned the claim. An abandoned mining claim reverts to the public domain of the United States, but a new location segregates every part of the mining claim from the public domain and vests possessory title in the locators.

(2) There is need for this Court to make clear that invalidation of an earlier location of a mining claim by administrative decision that insufficient mineral discovery had then been accomplished, does not affect a subsequent location of the same ground. The earlier ruling is not res judicata and does not control the new location.

(3) This Court should correct the false assumption that Forest Service

can take upon themselves authority to disregard a subsequent locator's location of a mining claim on land open to mineral entry and seize the claim as "Property of the United States" by posting a notice prohibiting any person from trespassing thereon. Until invalidated by a proceeding which satisfies the locator's right to "Due Process", the claim must be respected by federal employees. It is their duty to observe the mining law.

(4)The Court should correct the false assumption that a civil rights action charging low level federal administrative agents with violation of Fifth Amendment rights to "Due Process" and protection against the taking of property in the name of the United states without compensation, pursuant to a conspiracy to do so, should be dismissed without allowing plaintiffs opportunity to prove their allegations, when defendants aver "good faith belief in the appropriateness of their actions."

In Butz v. Economu, 93 S Ct. 2894, the opinion of four members of this Court, concurring in part and dissenting in part, recognizes that summary judgment on affidavits and the like is inappropriate when the central, and perhaps only, inquiry is the official's state of mind. (Citing Wright, Law of Federal Courts 493 (1976) and Subin v. Goldsmith, 224 F2d 753 (CA 2 1955).

The statements made by defendants in the present case to support their

motion for summary judgment studiously substituted mention of Mrs. Wagner's earlier claim and avoided mention of petitioner's current location of the ground. They were an incomplete basis for summary judgment and plaintiffs should have been allowed opportunity to impeach this testimony at a trial. As the Second Circuit pointed out in Subin v. Goldsmith, Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses the plaintiff should have opportunity to impeach them at a trial." 224 F 2d 752, 758 (2d Cir. 1955). The court explained that in such circumstances, failure of the party opposing summary judgment to file counter-affidavits does not compel acceptance as true of facts alleged in the movant's affidavits.

Similarly, the Tenth Circuit stated in National Aviation Underwriters v. Altus Flying Service, Inc., 555 F2d 778 (1977) that affidavits are not a substitute for trial, and summary judgment is improper where the issue turns on credibility.

In discussing the proof of a conspiratorial agreement, the court observed in Rholfing v. Cat's Paw Rubber Co., 17 FRD 426 (N.D. Ill. E.D. 1954) that the issue of conspiracy is always an issue of fact. Actual proof of a conspiratorial agreement cannotk in the nature of things, usually be made, so that it must often be inferred from proof of acts of the parties under circumstances in connection therewith.

When confronted with a defendant's sworn answer, affidavit and answers to interrogatories denying participation in any conspiracy and disclaiming knowledge of such conspiracy, the court declined to grant the defendant's motion for summary judgment, even though plaintiffs did not submit any counter-affidavits, as contemplated by Rule 56, but held that the issue of conspiracy remained a material issue. In the present case also, this issue of fact was not suitable for summary disposal.

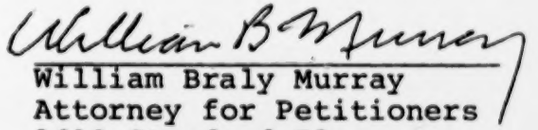
CONCLUSION

Low level administrative agents who seize in the name of the United States mining claims and structures thereon, when the locators' possessory title has not been invalidated by any administrative or court proceedings, are acting outside the scope of any official authority, and these agents are not entitled to claim immunity from damage actions for deprivation of the locators' property rights and right to "Due Process of Law" guaranteed by the Fifth Amendment to the Constitution of the United States.

Citizens injured by deprivation of constitutional rights should not be summarily cut off from proving their cause of action, brought either directly under the self-executing provisions of the Constitution or under the Civil Rights Acts.

Unless the erroneous decisions in Walker v. Hoffman and the present case are reviewed and corrected, low level federal administrative employees will be encouraged to trample upon the rights of subsequent locators of mining claims.

Respectfully submitted,



William Braly Murray
Attorney for Petitioners
1610 Standard Plaza
Portland, Oregon 97204
Telephone: (503) 226-3819

APPENDIX

	Page
Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit	A-1
Magistrate's Recommendation and Order of the District Court for the District of Oregon	A-6

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLORIA A. BROTHERS and EDGAR C. NEWALL,	)	
	)	No. 77-1093
Plaintiffs-Appellants,	)	
	)	MEMORANDUM
v.	)	
	)	
ARTHUR SCHIMKE, TOM OLIVER, JAMES BELA, KEN GILBERTSON, CHIP CARTWRIGHT, DOES IV THROUGH VI,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court for the District of Oregon

Before: VAN DUSEN,* WRIGHT and GOODWIN, Circuit Judges.

The plaintiffs, Brothers and Newall, sued several forest service officials for deprivation of property, alleging a conspiracy to deprive them of property and negligent failure to prevent the conspiracy. The defendants moved for summary judgment, claiming immunity as federal officials because they had acted reasonably and in good faith within their official capacities.

Upon the plaintiffs' failure to present specific facts beyond the mere allegation of a conspiracy, the district court granted summary judgment for the defendants. The only issue of conse-

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* Senior Circuit Judge for the Third Circuit

quence is whether summary judgment was properly granted. We affirm.

The property of which the plaintiffs were allegedly deprived is a mining claim on which two cabins are located. The claim had previously been held by Mrs. Wagner, a friend of the plaintiffs.

In February 1974, the Department of the Interior declared Mrs. Wagner's claim to be invalid. The Forest Service wrote to her several times that if she did not remove the cabins, they would become the property of the United States. When she failed to act, forest service officials met with her and plaintiff Brothers on July 28, 1975, and advised her of a July 31, 1975 deadline to remove her property. Offers by the officials to assist in the removal were declined by Mrs. Wagner.

The day after the meeting, unknown to the forest service officials, plaintiffs filed a mining claim coinciding with the boundaries of the Wagner claim. On July 31, 1975, defendant Schimke posted a sign on the cabins stating that they were United States property and trespass was prohibited under penalty of law.

The plaintiffs assert that the sign interfered with and deprived them of their right to prospect the claim. Although they have not clearly established whether this is the case, we shall resolve this threshold question, for purposes of this analysis, in the plaintiffs' favor.

It is also unclear from the briefs and record whether the plaintiffs assert that the posting of the sign deprived them of the use of the cabins. If so, they would have to show a possessory interest in them. It is well settled that buildings abandoned by a former claimant whose claim was invalidated become the property of the United States.

The question here is whether the cabins were abandoned before the plaintiffs located their claim. The authority most heavily relied upon by the plaintiffs, The Yankee Lode Claim, 30 L.D. 289 (1900), deals onlywith the rights of prior and subsequent mining claimants as against each other rather than the rights of a claimant as against the United States. We conclude that the plaintiffs failed to show a possessory interest in the cabins. See Brothers v. United States, No. 75-972 D. Ore. June 9, 1977), appeal docketed No. 77-3044 (9th Cir. Sept. 6, 1977), an unpublished disposition of an action for inverse condemnation by these same plaintiffs in which the court held that they had shown no possessory interest in the cabins and that, even if they had, they had shown no value of the cabins entitling them to an award.

Even if the plaintiffs could show an interference with their rights to prospect and could establish that they had a possessory interest in the cabins, the question remains whether the mere allegations of conspiracy should preclude summary judgment for defendants based on a federal immunity defense.

The plaintiffs argue that summary judgment is not appropriate in civil rights and conspiracy actions. This court's opinion in Walker v. Hoffman, No. 77-2694 (9th Cir. June 23, 1978), disposes of the issue.

Walker and Brothers present essentially the same fact situation, with the exception that the Forest Service officials actually confiscated and destroyed the appellant's property in Walker but only posted a "No trespassing" sign in Brothers. Appellant in Walker alleged that the officials "conspired to and did deprive him of his constitutional rights" in violation of 42 U S.C. §1985(3). Walker at ____. There, as here, the officials defended that they were entitled to qualified immunity because they reasonably believed the action was appropriate and they acted in good faith. See Barr v. Matteo, 360 U.S. 564, 565 (1959); Mark v. Groff, 521 F2d 1376, 1380 (9th Cir. 1975).

The court in Walker found that appellant's complaint and affidavit alleging harassment by the officials, without more, constituted an "unsupported conclusory allegation insufficient to generate a 'genuine issue' as to the good faith of appellees." Walker at ___. Appellants' allegations here are equally unsupported.

In reliance on Tillman v. Wheaton-Haven Recreation Association, 517 F2d 1141 (4th Cir. 1975), the plaintiffs argue that they are not required to prove bad faith. Tillman is inapposite

as it involved a suit against corporate directors and the defense of immunity of federal officers is not at issue.

There was no genuine issue of material fact regarding the bad faith of the defendants, therefore they are entitled to prevail on their limited immunity defense. The district court correctly granted summary judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

GLORIA A. BROTHERS and EDGAR C. NEWALL, Plaintiffs,	Civil No. 76-409
v.	RECOMMENDATION AND ORDER
ARTHUR SCHIMKE, TOM OLIVER, JOHN DOES I through X, Defendants.	

Plaintiffs, brother and sister, are alleged owners of an unpatented mining claim in Eastern Oregon. They bring this action against defendant Forest Service personnel in their individual capacities, alleging violations of plaintiffs' civil rights. Jurisdiction is based on 28 U.S.C. §1943.

The mining claim was originally known as the Vivian Placer Claim. The claimant was a Mrs. Wagner. However, on February 7, 1974, her claim was declared null and void by a Department of Interior Administrative Law Judge, and Mrs. Wagner did not appeal. Situated on the claim were two small cabins and assorted mining equipment. District Ranger Arthur Schimke, defendant in this action, notified Mrs. Wagner by letter that the cabins would have to be removed from federal property by July 31, 1975. A meeting was held in defendant's office on July 28, 1975, attended by

Mrs. Wagner and plaintiff Brothers. At the meeting the Forest Service personnel explained that all the personal property on the claim would become property of the United States if it was not removed by July 31. Offers by the personnel to assist in the removal were declined by Mrs. Wagner. Mr. Cartwright, staffofficer of the Baker Ranger District, specifically called plaintiff Brothers at her request after the meeting to tell her that the cabins would be posted after July 31, 1975.

The complaint alleges that the plaintiffs' mining claim was located on July 29, 1975, one day after the meeting. On July 31, defendant Schimke had an employee post the signs on the cabins declaring that they were government property. It is this act of posting for which plaintiffs are alleging damages in the sum of $300,000. A similar claim has been filed against the United States in a separate action.

Defendants move for summary judgment on the basis of immunity as federal employees. A qualified immunity is available to these federal employees if (1) at the time of the action and in light of all the circumstances, there existed reasonable grounds for the belief that the action was appropriate, and (2) the officers acted in good faith. Scheuer v. Rhodes, 416 U.S. 232, 247-249 (1974); Mark v. Groff, 521 F2d 1376, 1379-1380 (9th Cir. 1975); Williams v. Wright, Civil No. 74-614 (D. Ore. August 10, 1976.

In support of their motion defendants have submitted affidavits and answers under oath attesting to their good faith

belief in the reasonableness of their conduct. Defendant Tom Oliver says that he had nothing whatsoever to do with posting the signs on the claim. Defendant Schimke says that he had the signs posted because he believed that the claim had been declared null and void in the administrative proceeding. Both defendants deny any knowledge of the alleged "conspiracy" to violate plaintiffs' civil rights.

When defendants set forth such affidavits, and plaintiffs fail to respond with specific facts regarding the defendants' good faith reasonable grounds, there is no need to require defendants to face an expensive, unnecessary trial. Summary judgment is appripriate. Economu v. U.S. Dept. of Agriculture, 535 F 2d 688, 696 (2d Cir. 1976). Plaintiffs' countering affidavits in this instance are insufficient to defeat summary judgment. Although plaintiff Brothers speaks of a conspiracy among Forest Service personnel to retaliate against her because of an incident on another mining claim in 1966, there is no evidence that these defendants were (1) aware of the previous incident, or (2) were acting with ill motive in this incident. In fact, there is no showing that defendants were doing anything other than posting signs on a claim that they believed had been declared void. Plaintiffs' memorandum goes into much length to establish that the Department of the Interior, and not the Forest Service under the Department of Agriculture, has sole authority to determine the

validity of mining claims. But that misses the point. There is no showing that these defendants were even aware of plaintiffs' attempted relocation at the time that the cabins were posted.

Accordingly, defendants' motion for summary judgment should be granted and the action against them dismissed.

Dated this 5th day of November, 1976.

/s/ George E. Juba
United States Magistrate

After review of the file and record in this case, I approve the foregoing recommendation.

IT IS ORDERED that defendants' motion for summary judgment is granted and the action against them is dismissed.

Dated this 8th day of November, 1976.

/s/ Robert E. Belloni
United States District Judge

Supreme Court, U.S.
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No. 78-1112

In the Supreme Court of the United States

OCTOBER TERM, 1978

GLORIA A. BROTHERS AND EDGAR C. NEWALL, PETITIONERS

v.

ARTHUR SCHIMKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners contend that the district court erroneously granted summary judgment in favor of respondents, employees of the United States Forest Service who were alleged to have posted "no trespassing" signs on two cabins located on a mining claim that the Department of the Interior had determined to be invalid. Petitioners alleged that they had filed a mining claim with boundaries coextensive with those of the invalidated claim one day after a meeting with federal officials at which the invalid claim's owner, a friend of petitioners, had received the last of several warnings that if she did not remove the cabins they would become the property of the United States.

As both the petition (Pet. 13-14) and the court of appeals (Pet. App. A-4) state, this case presents almost the same fact situation as *Walker* v. *Hoffman*, 583 F. 2d 1073 (9th Cir.), cert. denied, No. 78-724 (Jan. 22, 1979).

The difference is that in *Walker* the Forest Service officials actually destroyed the cabin and confiscated abandoned personal property, while in this case they only posted "no trespassing" signs.

Here, after the Interior Department had invalidated a mining claim on national forest land, formerly owned by a Mrs. Wagner, Forest Service employees notified her that, if she failed to remove two cabins from her former claim by a specified deadline, the cabins would become property of the United States. The final notification was given at a meeting of Forest Service employees with Mrs. Wagner and petitioner Brothers (Pet. 6). The next day, two days before the deadline, petitioners filed a new mining claim coinciding with the boundaries of the earlier claim (Pet. App. A-7). On the deadline date, a Forest Service employee posted notices declaring the cabins federal property (*ibid.*).

Petitioners' suit against the Forest Service employees was based on an alleged conspiracy to deprive petitioners of their property. Respondents moved for summary judgment on the basis of affidavits attesting to the reasonableness of their conduct, the named respondent who posted the signs stating that he did so in a good faith belief that the claim was invalid (Pet. App. A-7 to A-8). Respondents' summary judgment motion was granted by the district court and the order was affirmed by the Ninth Circuit, on the basis of the immunity accorded federal employees performing their official duties reasonably and in good faith. (Pet. App. A-4.) The court of appeals also held that "buildings abandoned by a former claimant whose claim was invalidated become the property of the United States" (Pet. App. A-3) and that petitioners, beyond filing a new mining claim, had failed to state any facts establishing their possessory interest in the abandoned cabins.

Petitioners contend (Pet. 16) that they should have been allowed to prove their allegations of bad faith. They do not contend, however, that they invoked, much less that the district court improperly denied, the procedure of Fed. R. Civ. P. 56(f), which permits a court to postpone ruling on a summary judgment motion in order to allow discovery. Absent any such claim, Rule 56 makes it clear that a summary judgment motion may not be denied merely because the party opposing it hopes to develop evidentiary leads at trial or later proceedings. Rather, Rule 56 requires the district court to determine whether there are genuine issues of material fact on the basis of the record before the court. Here, the district court and the court of appeals properly held that the summary judgment record presented no genuine issue of material fact concerning respondents' immunity.

The rulings are in accord with the suggestion of this Court in *Butz* v. *Economou*, No. 76-709 (June 29, 1978), slip op. 28, that "damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity." As this Court also observed (slip op. 28-29), "[i]n responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979.

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